



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 254 OF 2007

JOHN WAMUTI MUHUNGI ::: PLAINTIFF

VERSUS

HOUSING FINANCE (K) LIMITED ::: 1ST DEFENDANT

JOHN GITHUA NJOGU ::: 2ND DEFENDANT

R U L I N G

1. The application before the court is a **Notice of Motion** application dated **26th March 2013** and filed in court on 28th March 2013. The application is filed under Order 24 Rule 3 (1), and 7 (2) and Order 51 Rule 1 of the Civil Procedure Rules 2010. The application seeks the following orders:
 - a. *That this honourable court be pleased to revive this suit for hearing.*
 - b. *That Margaret Wambui Wamuti and Julius Kamithi Wamuti be substituted with the Plaintiff.*
 - c. *That the costs of this application be in the cause.*
2. The application is premised on the grounds set out therein *inter-a-alia* that:-
 - a. *The Plaintiff passed away on 1st December 2010 and a year later, this suit abated;*
 - b. *The Applicant was prevented by sufficient cause from continuing with this suit.*
 - c. *It is in the interests of justice that this suit be revived for hearing.*
 - d. *The cause of action herein survived the death of the Plaintiff.*
 - e. *Margaret Wambui Wamuti and Julius Kamithi are the legal representatives of the estate of the deceased Plaintiff and should therefore be substituted with the latter as Plaintiffs in this suit.*
3. It is supported by the affidavit of **MR. JULIUS KAMITHI WAMUTI** dated **26th March 2013** with its annexures.
4. The Applicants are the legal representatives of Mr. John Wamuti Muhungi, the deceased Plaintiff. The Applicants secured letters of grant to the estate of the deceased on 3rd November 2011. The Plaintiff had passed away on 1st December 2010, and so this suit abated within one year of the Plaintiff's death.

The suit herein having abated by operation of the law, the Applicants now seek to revive it, and to have themselves be substituted in the place of the Plaintiff who is deceased.

5. Both the Defendants have opposed the application. The 1st Defendant has through its General Manager **MR. GEORFFREY KIMAITA** sworn a replying affidavit dated **30th August 2013** in

- opposition to the application.
6. The brief history of the application before the court is that by a Plaintiff filed in court on 17th May 2007 the Plaintiff sought to reverse the sale of his property L.R. No. KIAMBU/THIMBIGUA/1620 to the 2nd Defendant which took place on 19th April 2006 in a public auction at the behest of the 1st Defendant. The Plaintiff also sought a declaration that the 1st Defendant had levied illegal charges and penalties on his loan account number 600 – 000872 with the 1st Defendant. The Plaintiff also sought general damages. The Plaintiff had earlier in 1984 secured a loan of Kshs.200,000/- from the 1st Defendant. He failed to repay the said loan leading to the sale of his property in the public auction.
 7. Before this matter could be concluded, the Plaintiff died in the year 2010 and his representatives failed to take out substitutionary proceedings leading to the matter abating by operation of the law.
 8. The issue before the court is whether or not the suit having abated, there are enough grounds given by the Applicant for the revival of the same.

Order 24 Rule 3 (1) provides:-

“Where one or two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiff’s alone; or a sole Plaintiff dies and the cause of action survives or continues, the court, on application made in that behalf, shall cause the legal representation of the deceased Plaintiff to be made a party and shall proceed with the suit.”

Order 24 Rule 7 (2) of the Civil Procedure Rules, 2010 provides that:-

“The Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff . . . may apply for an order to revive a suit which has abated or to set aside an order for dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”

9. It follows that this court can revive a suit which has abated. However, Rule 7 (2) explains circumstances under which the court may revive a suit that has abated. It requires that the Applicant shall prove that he was prevented by any sufficient cause from continuing with the suit.
10. The issue for me, therefore is whether or not the Applicant has met that threshold. I have looked at the grounds in the application upon which this application is premised. The Applicant merely states at ground number (b) that ***“The Applicant was prevented by sufficient cause from continuing with this suit.”***
11. I have also looked at the supporting affidavit of **Julius Kamithi Wamuti**. According to that affidavit the Plaintiff died on 1st December 2010, and the Applicants secured a grant of representation to the estate of the Plaintiff on 3rd November 2011, about 27 days before the suit abated. So of utmost importance is what the Applicants did with the grant before the suit abated, or what they did with the grant soon after the suit abated. However, the Applicants stated at paragraphs 8 and 11 of the supporting affidavit that they were not aware of the pendency of this suit and therefore they could not take any action, and that the suit abated due to circumstances beyond their control. The Applicants do not disclose how they became aware of the pendency of this suit, except that as soon as they became aware, they took steps to revive the suit. However, it is noted that Margaret Wambui Wamuti, the co-Applicant herein swore an affidavit in support of an application dated 27th August 2012 (which was later withdrawn) in which at paragraphs 3 and 4 she admits that as a family, they set down and came to an agreement to apply for letters of administration for purposes of substitution in this case, and that they had applied for the letters *ad litem*. That application for letters *ad litem* was received in court on 21st July 2011 which was some seven (7) months after the Plaintiff passed away. It would appear that the Applicants are not very truthful about when they became aware of the suit. The Applicants have not shown sufficient cause required under Order 24 Rule 7 (2) for the revival of the suit.

12. Quite apart from above consideration, I am also concerned with the time the Applicants took to seek to revive the suit. The Applicants secured letters of grant on 3rd November 2011. By that time, in their own admissions in the affidavit dated 27th August 2012, the Applicants were already aware of the pendency of this suit. Yet, this application is filed in court on 26th March 2013. The Applicant obtained letters of grant almost a month before the suit abated. Even if that was not along enough period to make the current application, what transpired after the suit abated does not make things easier for this court to grant the orders sought. The Applicants took more than fourteen (14) months to make this application after securing the grant. That is what equity calls indolent. A court of equity which this is, does not give relief to the indolent Applicants.

13. Pursuant to the foregoing, I am not satisfied that the present application is one to be allowed. I hereby dismiss the application dated 26th March 2013 with costs to the Respondents.

DATED, READ AND DELIVERED AT NAIROBI

THIS 5TH DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Mungai for Plaintiff

Mare holding brief for M/s Kimani for 1st Defendant

Munyororo for 2nd Defendant

Teresia – Court Clerk